89-129

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BERNARD F. GOLDBERG, SR.,
Petitioner

v.

THE STATE OF MARYLAND,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Whether the Petitioner is entitled to a Writ of Certiorari because he was tried and convicted under an invalid indictment which violated his rights to due process of law and equal protection of the laws under the Constitution of the United States and the Constitution of the State of Maryland.

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v.

THE STATE OF MARYLAND,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Bernard F. Goldberg, Sr., by Lewis Straughn Nippard, his attorney, Petitions for a Writ of Certiorari to review the Judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The Opinion of the Court of Appeals of Maryland is reported at 315 Md. 653 (1989) (Appendix A, 1a-14a). The Opinion of the Court of Special Appeals of Maryland is reported at 69 Md. App. 702, 519 P. 2d 779 (1987) (Appendix B, 15a-34a).

JURISDICTION

The Opinion of the Court of Appeals of Maryland was entered on April 12, 1989. A Petition for Reconsideration was denied on May 26, 1989. The jurisdiction of this Court is invoked under Rule 17.

STATEMENT OF THE CASE

This is an appeal from the Judgment and Sentence of the Circuit Court for Howard County which was rendered by the Honorable Martin A. Wolff on April 14, 1986 upon Bernard F. Goldberg, Sr. The Defendant was convicted of misappropriation and theft and sentenced to be committed to the custody of the Commissioner of Corrections for a period of seven (7) years with all but two years suspended and he was ordered to pay restitution. The trial was had before the Court on an Agreed Statement of Facts which was read into the record by counsel for the State.

Prior to trial a Motion to Dismiss the Indictment was filed by the Petitioner, answered by the State and denied by the Court. It is contended that because the Indictment was a nullity the Judgment and Sentence should be reversed. Appeal was taken from the Judgment and Sentence to the Court of Appeals which affirmed the ruling of the trial court. The Petitioner filed a Petition for Certiorari to the Court of Appeals of Maryland which was granted. The case was briefed and argued before the Court of Appeals on October 5, 1987. The Opinion was rendered affirming the Court of Special Appeals on April 12, 1989.

A Motion for Reconsideration was filed. It was denied by the Court of Appeals on May 26, 1989 and its Mandate was issued on the same date to the Court of Special Appeals. The Court of Special Appeals issued its Mandate to the Circuit Court for Howard County on June 7, 1989.

On June 21, 1989 Petitioner appeared before the trial judge, who denied his request for bail pending the filing of a Petition for a Writ of Certiorari to the Supreme Court of the United States and ordered him in to the custody of the Maryland Department of Correction to commence serving the sentence originally imposed.

REASONS FOR GRANTING THE PETITION

The Petitioner submits that the question presented in this case is whether he is entitled to a Writ of Certiorari because he was tried and convicted under an invalid indictment which violated his rights to Due Process of Law and Equal Protection of the Laws under the Constitution of the United States and the Constitution of the State of Maryland.

At the outset the Petitioner moved to dismiss the indictment contending that the State Prosecutors were acting illegally when they undertook to prosecute the Petitioner under the guise of "Special Assistant State's Attorneys". Their appointment as such was occasioned by the fact that the State Prosecutor's authority is limited to the specific class of cases enunciated in the *Annotated Code of Maryland*, 1957, 1987 Repl. Vol., Act 10, Sec 33 A et seq. as follows:

> *Investigations—Offenses enumerated*—Except with respect to offenses alleged to be committed by himself or members of his staff, he may, on his own initiative, or at the request of the Governor, the Attorney General, the General Assembly, the State Ethics Commission, or a State's Attorney, investigate:
>
> 1. Criminal offenses under the State election laws;
>
> 2. Criminal offenses under the State Public Ethics Law;
>
> 3. Violations of the State bribery laws in which an official or employee of the State or of a political subdivision of the State or of any bicounty, or multicounty agency of the State was the offerer or Offeree, or intended offerer or offeree, of a bribe;
>
> 4. Offenses constituting criminal malfeasance, misfeasance, or nonfeasance in office committed by an officer or employee of the State or of a political subdivision of the State or of any bicounty or multicounty agency of the State. Any person who is under

investigation may, at his discretion, release this information including any results pertaining to him to the public; and

5. Violations of the State extortion, perjury, and obstruction of justice laws related to any activity described in subsection (b) (1) through (4).

Same—Criminal activity in more than one jurisdiction.—At the request of either the Governor, Attorney General, General Assembly or a State's Attorney, the State Prosecutor may investigate criminal activity conducted or committed partly in this State and partly in another jurisdiction, or which is conducted or committed in more than one political subdivision of the State.

From the outset, it has been contended on behalf of the Petitioner the State Prosecutors did not have the authority to investigate and prosecute this case and that their doing so nullified the indictment and the subsequent conviction thereunder. In the Answer to the Motion to Dismiss the Indictment, the State asserted:

7. The undersigned Special Assistant State's Attorneys *are not acting in the matter as Deputy or Assistant State Prosecutors, but are rather acting as Special Assistant State's Attorneys* (emphasis supplied) (duly appointed by William Hymes, State's Attorney for Howard County, pursuant to Article V, Section 9 of the Constitution of the State of Maryland, Article 10, Section 34 and 40 (n) of the *Annotated Code of Maryland* . . .

14. There is no legal impediment preventing members of the State Prosecutor's staff from representing the State in an alternative capacity . . .

16. The State Prosecutor, Steven Montanerelli, *authorized* (emphasis supplied) the assignment of both undersigned counsel (Ruter and Penner) to act as Special Assistant State's Attorneys in this case at the *request* (emphasis supplied) of State's Attorney, William Hymes . . .

Furthermore, the Memorandum filed by the State in support of its Answer to the Motion To Dismiss the Indictment states as follows:

> Aware of the special expertise of the State Prosecutor's Office in investigating white collar crime, the State's Attorney for Howard County approached the State Prosecutor for assistance in this matter. The State Prosecutor, upon the State's Attorney's request, authorized members of his staff to assist the State's Attorney and act in the capacity of Special Assistant State's Attorneys for *this one investigation only* (emphasis supplied). It was clearly understood from the beginning that the Office of Special Assistant State's Attorney would not be compensated in any way. No attorney serving as Special Assistant would receive any compensation for the services of members of the State Prosecutor's Office . . .
>
> And on (E-11) it is stated as part of the same memorandum, . . . *Counsel for the State were not acting as Deputy or Assistant State Prosecutors.* (emphasis supplied). The State's Counsel was not appointed pursuant to Section 2-102 of the Courts and Judicial Proceedings Article. The Special Assistant State's Attorneys were appointed pursuant to Article V., Section 9 of the Constitution of Maryland and Article 10, Section 34 and Section 40 (n) (3) of the *Annotated Code of Maryland.* The Special Assistant State's Attorneys appeared before the Grand Jury and no paid member of the State's Attorney's staff was involved in this matter.

Until the publication of the Opinion of the Court of Appeals, there had not been an assertion that Messrs. Ruter and Penner were acting under their authority as State Prosecutors during this case. Indeed, they had specifically disclaimed acting as State Prosecutors and relied completely upon their appointment as Special Assistant State's Attorneys by Mr. Hymes with the authorization of Mr. Montanerelli. It is edifying, in the sense of legal and constitutional vindication, that the Court

agrees with our contention that the State Prosecutor may not expand the categories of his jurisdiction as defined in Article 10, Section 33 B, of the *Annotated Code of Maryland*. As the Court points out, "If a State's Attorney and the State Prosecutor could expand the categories set forth in 33 B, by the simple expedient of having the State's Attorneys request accompanied by a designation of " 'Special Assistant State's Attorney' ", it would render meaningless the General Assembly's purpose of limiting the State Prosecutor's jurisdiction to specified offenses". (Appendix A, 10a)

However, it seems that the Court of Appeals has placed a connotation on the facts of this case which is a complete surprise and which denies the Appellant the benefit of having successfully established the legal vindication to which the law appears to have entitled him and which creates a new manifestation of denial of equal protection and due process.

The Opinion, drawing solely upon the testimony of Mr. Hymes, states, "that there was a pretty good possibility that his office did have jurisdiction". (Appendix A, 4a)

The testimony cited by the Court represents the initial reaction of Mr. Hymes to the original Complaint submitted to him. (Appendix A, 4a) It is obvious that his involvement in the case was brief and fleeting. It is also obvious that his principal reason for shying away from the case was that, "It would be best to have some impartial outside source look into the matter". At that time, there was no evidence that the matter involved criminal activity in more than one county. He referred the matter to the State Prosecutor who upon review determined that the State Prosecutor's Office did not have jurisdiction. The State Prosecutor eliminated this as a basis for his exercising jurisdiction when he authorized and concurred in the appointment of Messrs. Ruter and Penner by Mr. Hymes as Assistant State's Attorneys.

Furthermore, having disclaimed it in the Circuit Court and the Court of Special Appeals the State had no authority to initially raise the issue of reliance upon the authority of the State Prosecutor in the Court of Appeals. It had not been raised below and was not raised in the State's Cross-Petition for Certiorari. Accordingly we respectfully submit that the consideration of this issue was precluded by Rule 8-131.[1]

For the Court now to say that they were in fact acting under their authority as State Prosecutors when they had determined and stated that they were not, is to make a judgment which is unsupported by the evidence and precluded by the rule. The Court says that it need not, in this case, decide what the effect would have been if the State, as matter of fact and law, had in the trial court unequivocally abandoned any reliance on the attorneys' role as members of the State Prosecutor's staff. (Opinion P.17). We contend the State did abandon any such reliance. We contend the State's Answer to the Motion to dismiss the Indictment hereinbefore cited was the pleading which constituted such an abandonment.

We contend that the Petitioner was entitled to rely upon it, under theories of admission against interest, fundamental pleading, and/or estoppel. The State never stated that it was authorized to, or was, in fact invoking or relying upon such authority.

---

[1] Rule 8-131. SCOPE OF REVIEW

(a) Generally.—The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The Opinion concluded with the bald statement that the Appellant was in no way prejudiced. We disagree. He was prejudiced because he was tried under an indictment invalidated by the fact that the case was investigated and prosecuted by persons who were not authorized to do so. As cited in *State v. Madison* 240 Md. 265, 213 A.2d 880 (1965) (the Court held an indictment invalid even though the Defendant could show no actual prejudice. Here there was prejudice because the State declared its basis for jurisdiction and now we are confronted with an entirely new prosecutorial theory of jurisdiction. Due process and simple justice ordain that we should not be denied relief because our basic contention of illegality is now confirmed, but a new theory, never pleaded or relied upon arises from the Court's Opinion. Furthermore, in its brief to the Court of Special Appeals, the State reaffirmed its previous disavowal of the authority of Messrs. Ruter and Penner to prosecute under their authority as State Prosecutors:

> Appellant contends that under *Maryland Annotated Code*, Article 10, Section 33 B, Penner and Ruter may not accept a position as a Special Assistant State's Attorney because it is in derogation of the statute limiting the particular offenses the Special Prosecutor's Office may investigate. *However in this case they were not acting as State Prosecutors, they were sworn in specifically as Special Assistant State's Attorneys to investigate and prosecute this case.* (emphasis supplied). There was no attempt to circumvent limitations on the State Prosecutor's Office. Appellant's reliance on the State Prosecutor's statute, *Maryland Annotated Code* Article 10, Section 33 *et. sec.* is therefore misplaced.

In other words, the Appellant contended throughout that the State Prosecutor did not have jurisdiction and that the statutory authority conferred upon his office could not be expanded. The State agreed and said that it was not relying upon the authority of Ruter and Penner

as State Prosecutors but was relying completely upon the authority conferred upon them by the State's Attorney for Howard County when he appointed them "Special Assistant State's Attorneys for Howard County."

How then can it be now said that there was not an abandonment of reliance by the State of the role of Messrs. Ruter and Penner as members of the State Prosecutor's staff? The facts can logically and fairly produce no other conclusion than that when the matter was referred by Mr. Hymes to the State Prosecutor's Office for examination, their examination of the facts made them conclude that Mr. Hyme's original suspicion that the case "might involve the commission of offenses in more than one county" was not founded in fact.[2] It is obvious that this conclusion was discussed between the State's Attorney for Howard County and the members of the staff of the State Prosecutor and that they then jointly concluded that the only way that persons who were members of the State Prosecutor's staff could participate in this case was to invest them with separate authority to so act. This is what they did. They placed their complete reliance upon the authority of the State's Attorneys for Howard County to appoint the Deputy State Prosecutor and the Assistant State Prosecutor as "Special Assistant State's Attorneys." They had no choice but to do so if they wished to have these persons proceed with the prosecution. There was no basis for a bonafide invocation of their authority as State Prosecutors and the State Prosecutors never said nor concluded that there was. If there had been such a conclusion, what would have been the motivation or necessity of going through the process of appointing them as "Special Assistant State's Attorneys"?

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[2] In all pleadings in Trial Court and in the brief in the Court of Special Appeals, Gerald Ruter and Bernard Penner signed and styled themselves as "Special Assistant State's Attorneys for Howard County". In no place did they identify themselves as Deputy State Prosecutors or Assistant State Prosecutors.

The State put all its eggs in one basket. Now the Court of Appeals has said that it was the wrong basket. The State should not be allowed ex post facto to say that there was always another secret basket.

The totality of effect wrought by the abdication and or usurpation of the duties of the State's Attorney which resulted in the unlawful investigation, securing of an indictment and prosecution of the Appellant by the State Prosecutor is the denial of his rights to due process and equal protection of the laws as guaranteed by the State and Federal Constitution. It requires little citation of authorities to fortify this inescapable conclusion. In the case of *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965), the Court of Appeals, relying on State and Federal cases, declared an indictment invalid even though the Defendant could show no actual prejudice. The Court said at pages 268, 269,

> Supreme Court decisions requiring that the defendant be a member of the excluded class in order to have standing to attack the constitutionality of the method of jury selection under a law nondiscriminatory on its face are not here in point. In *Schowgurow*, we pointed out that, in such cases, "the question was whether, under a law, nondiscriminatory on its face, through administration or practice, there had been exclusion as a matter of fact. Here, there has been systematic exclusion for over a century by the mandate of the Maryland Constitution."
>
> Where, as here, the unconstitutional discrimination is an integral part of the governing law, a defendant in a criminal case whose conviction has not become final is not required to show that he is prejudiced by the application of the law. Every person accused of crime has the right to be tried under what has been determined to be the law of the land. In *Schowgurow*, the State, as here, contended there had been no showing of actual prejudice. We held that where the system of jury selection on its face

provides for illegal discrimination and exclusion, an actual showing of prejudice is unnecessary. It is the danger of abuse resulting from the method of selection which renders it unconstitutional. We pointed out that the exclusion of nonbelievers was not only authorized but demanded by the Maryland Constitution and that the resulting danger of abuse, under the decisions of the Supreme Court, obviates any need to show individual prejudice.

Almost a century ago, this Court held that, when the method of selection of a grand jury is clearly invalid, the challenge of a defendant to his indictment by that body must be sustained, without showing of prejudice. *Clare v. State*, 30 Md. 164 (1869). In that case, the defendant pleaded in abatement that the mandates of the law had not been followed in the selection of the grand jury, because its members had been selected not by the judges as the law required, but by a court clerk. The lower court found these allegations to be factually correct, but held they were mere informalities, not fatal defects. The pleas were overruled and the defendant was convicted. On appeal, we reversed the judgment of conviction, holding that the lower court erred in overruling the pleas. The defendant, Clare, had no alleged or proved any specific prejudice as to him in the unlawful method of selection. We said, however:

"Under any government of law the trial of persons accused of crime, from its commencement to the conclusion, should be scrupulously conducted according to the requirements of the law. Not only the sacred administration of public and private justice, but the good order of the community, the security and protection of life, liberty and property, cannot be preserved, except by the inflexible maintenance and impartial enforcement of the statutory, as well as the fundamental laws of the land." 30 Md. at 178.

The essence of due process and equal protection requires that a person may only be prosecuted by public officers who are invested with the authority to do so.

In this case there can be no justification for the attempt by the State's Attorney and the State Prosecutors to confer upon the State Prosecutor authority which was withheld by the Legislature and prohibited by the Constitution. To allow the indictment and conviction to stand in this case is to invite a continued pattern of prosecutorial over-reaching which will result in expansion of the power of the State Prosecutors and the loss of the independence of his office all to the detriment of justice. See also *Torosev v. Watkins*, 367 U.S. 488 (1961). *Bollard v. United States*, 329 U.S. 187 (1946) and *Cossell v. Texas*, 339 U.S. 282 (1950). In deciding *State v. Madison* the Court of Appeals of Maryland correctly applied the standards established by the Supreme Court for determining violations of due process and equal protection of the laws, but in the instant case it has deviated from those standards and denied the Petitioner his rights.

The duties and authority of the State Prosecutor and those of the respective State's Attorneys have been created and defined by the Constitution and Statutes of the State of Maryland with the clear intent of restricting each from usurping the functions of the other or abdicating the same to the other. The course of conduct by the State's Attorney and the State Prosecutor, however well intentioned, has violated the provisions of the Constitution and the Laws and frustrated the intent to maintain the respective prosecutorial offices as separate, independent entities designed to carry out only their specifically designated duties with respect to the administration and enforcement of the Laws.

We must also respectfully contest the Court's conclusion that the Petitioner was indicted for criminal activity in more than one subdivision and was convicted of the same. (Appendix A, 11a) A careful scrutiny of each count of the Presentment by the Grand Jury for the Body of Howard County and of the Indictment re-

veals that the charges all refer to Howard County as being the jurisdiction in which the offenses were alleged to have been committed. The Presentment begins. "The Grand Jurors for the State of Maryland for the body of Howard County" and each count refers to Howard County as, "the county aforesaid." (Appendix F, 42a)

While it may be true that a crime may be committed in more than one county, such did not occur in this case. Since there was no charge that offenses were committed in more than one county, it is not possible that a conviction could be had when such a charge was not stated in the Presentment or Indictment. It is further submitted that the Statement of facts does not establish evidence of criminal activity in any other county than Howard County even had it been so charged and had the Defendant been indicted on such a theory.

It is the Petitioner's contention that he could be tried only upon a valid indictment. There is at least an implication in the Court's Opinion that even if he was not, he was not prejudiced.

We contend that had the Petitioner known that the State was proceeding on a theory that Messrs. Ruter and Penner were authorized to proceed and were in fact proceeding as State Prosecutors, he would have pursued his original premise and attacked the factual and legal basis for such a prosecution, on the basis that their involvement exceeded their statutory authority. No one should be convicted upon an invalid indictment, especially when its validity was made the subject of a timely attack. The State chose to persist in the prosecution under an invalid indictment. The Court has verified our basic contentions as to the impropriety of the State Prosecutor joining with a State's Attorney to stretch his jurisdiction beyond that lawfully conferred.

CONCLUSION

The central ruling in this case should halt the past and present practice by which State Prosecutors and State's Attorneys have joined to thwart the intent and purpose of the law and Constitution of the State of Maryland and the Constitution of the United States. This cozy practice is rife with the seeds of injustice and corruption. The vigor with which it has been defended in this case confirms that it's employment is not limited to this case. Indeed, the record shows that, although he did not personally appear before the Grand Jury in this case, Stephen Montanarelli, the State Prosecutor, was sworn as a Special Assistant State's Attorney, indicating that he was sworn in a different case or cases. The appointments of State Prosecutor Stephen Montanarelli, Deputy State Prosecutor Gerald Ruter and Assistant State Prosecutor Bernard Penner as "Special Assistant State's Attorneys" were open-ended and as far as is known have not been revoked or terminated. It is not known how many such other illegal appointments of State Prosecutors as Special Assistant State's Attorneys have been made in other counties. We believe that there may have been many. It is the effect of such appointments that should be of deep public concern and which the Court should insure are terminated.

It should be foremost in the consideration of this case that the purpose of the creation of the Office of State Prosecutor was to establish the means for the *independent* prosecution of certain offenders and offenses. The practice followed in this case reveals a pattern of activity which seriously threatens the independence of the State Prosecutor and the independence of State's Attorneys, as well.

In tailoring the Opinion in this case it appears that the Court of Appeals has not only cut the cloth so it does not fit the Petitioner, but also suggested a way for the Prosecutors to continue the practice in the future.

If the State Prosecutor is not deemed to have abandoned the theory of multi-county offenses in this case, then such a contention, no matter how erroneous or spurious, can be utilized in future cases. After all, in this case, the only basis for such a notion, came from *the State's Attorney, not the State Prosecutor* before the case was actually investigated and rejected, not invoked, by the State Prosecutor after investigation.

It was urged by the Petitioner in the Trial Court and the Court of Special Appeals of Maryland that the appointment of State Prosecutors by the State's Attorney for Howard County to be "Special Assistant State's Attorneys for Howard County" was illegal and unconstitutional and the State Prosecutors could not undertake the duties of the State's Attorney. Thus, it was contended their appearance before the Grand Jury seeking and obtaining the Presentment rendered it and the ensuing Indictment null and void. The Trial Court and the Court of Special Appeals of Maryland rejected these contentions and held that it was not impermissible for State Prosecutors to accept appointment as "Special Assistant State's Attorneys in order to prosecute cases which they did not have authority to prosecute as State Prosecutors.

When the case was decided by the Court of Appeals of Maryland that Court agreed with the Petitioners original contention.

We believe that the manner in which the Court of Appeals of Maryland decided this case combined with original acts of the State Prosecutors and the State's Attorney for Howard County present the basis upon which the Supreme Court of the United States should grant its Writ of Certiorari. There is no right more critical than that which insures that no one should be indicted and tried for crimes except upon proper authority. There is no frustration greater than to have one's contention vindicated as to these matters, by the State's highest Court only to

have that same Court deny the benefits of that vindication by a judicial revision of the pleadings evidence and declared position of the State throughout the case.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 43

September Term, 1987

BERNARD P. GOLDBERG, SR.

v.

STATE OF MARYLAND

MURPHY, C.J.
ELDRIDGE
COLE
RODOWSKY
MCAULIFFE
ADKINS
BLACKWELL,
JJ.

OPINION BY ELDRIDGE, J.

Filed: April 12, 1989

In 1985, the petitioner, Bernard F. Goldberg, Sr., then a member of the Maryland Bar, was indicted in the Circuit Court for Howard County on five counts of fraudu-

lent misappropriation by a fiduciary, one count of theft over $300.00, and one count of commingling client's funds with his own.[1] One of the fraudulent misappropriation counts and the commingling count related to a transaction involving real estate in Frederick County and, *inter alia*, money from the City of Frederick entrusted to Mr. Goldberg. One of the fraudulent misappropriation counts concerned Mr. Goldberg's conduct as settlement agent for the purchase of real property in Baltimore County. The remaining counts related to matters occurring solely in Howard County.

Mr. Goldberg filed in the Circuit Court for Howard County a motion to dismiss the indictment on the ground that the appearance of two unauthorized persons before the grand jury rendered the indictment invalid. The two allegedly unauthorized individuals were the Deputy State Prosecutor and an Assistant State Prosecutor.

The office of the State Prosecutor was initially created by Ch. 255 of the Acts of 1975. Following the decision in *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975) (which held the 1975 Act unconstitutional) and the ratification of a constitutional amendment (Ch. 545 of the Acts of 1976), the office of State Prosecutor was recreated pursuant to Ch. 612 of the Acts of 1976, codified in Maryland Code (1957, 1987 Repl. Vol.), Art. 10, § 33A *et seq.* Under the 1976 statute the State Prosecutor may employ such professional staff as authorized in the State budget (Art. 10, § 33C). With regard to investigations, Art. 10, § 33B, delineates the authority of the State Prosecutor as follows:

> "(b) *Investigations—Offenses enumerated.*—Except with respect to offenses alleged to be committed by himself or members of his staff, he may, on his

[1] Mr. Goldberg was disbarred by this Court on October 8, 1986. Attorney Griev. Com'n v. Goldberg, 307 Md. 546, 515 A.2d 765 (1986).

own initiative, or at the request of the Governor, the Attorney General, the General Assembly, the State Ethics Commission, or a State's Attorney, investigate:

(1) Criminal offenses under the State election laws;

(2) Criminal offenses under the State Public Ethics Law;

(3) Violations of the State bribery laws in which an official or employee of the State or of a political subdivision of the State or of any bicounty or multicounty agency of the State was the offeror or offeree, or intended offeror or offeree, of a bribe;

(4) Offenses constituting criminal malfeasance, misfeasance, or nonfeasance in office committed by an officer or employee of the State or of a political subdivision of the State or of any bicounty or multicounty agency of the State. Any person who is advised by the State Prosecutor that he is under investigation may, at his discretion, release this information including any results pertaining to him to the public; and

(5) Violations of the State extortion, perjury, and obstruction of justice laws related to any activity described in subsection (b)(1) through (4).

(c) *Same—Criminal activity in more than one jurisdiction.*—At the request of either the Governor, Attorney General, General Assembly or a State's Attorney, the State Prosecutor may investigate criminal activity conducted or committed partly in this State and partly in another jurisdiction, or which is conducted or committed in more than one political subdivision of the State."

As previously indicated, the basis for Mr. Goldberg's motion to dismiss the indictment in this case was that two

members of the State Prosecutor's staff appeared before the grand jury and were allegedly unauthorized to do so. The indictment itself, however, was signed by the State's Attorney for Howard County.

At the hearing on the motion to dismiss the indictment, the following facts were disclosed. When the Howard County State's Attorney's office first learned of the allegations against Mr. Goldberg, that office concluded that the investigation should be referred to the State Prosecutor. This decision was based on three factors: 1. the investigation involved more than one county; 2. Mr. Goldberg was then the Public Defender in Howard County; 3. Mr. Goldberg had once represented the State's Attorney in a civil case. Thus, Mr. Hymes, the State's Attorney for Howard County, testified as follows:

> "A . . . I believe at one time I wrote a letter to Mr. Montanarelli [the State Prosecutor] asking for the assistance of his office in conducting the investigation and if, in fact, the investigation resulted in information which would cause one to believe that charges ought to be brought that his office would be appointed Special Assistant State's Attorney for that purpose.
>
> "Q And you realized at that time that . . . that his office in its own right did not have jurisdiction in this case did you not?
>
> "A No, I did not. I was under the impression that there was a pretty good possibility that his office did have jurisdiction. If I can elaborate on this because my association with the case is reasonably minimal.
>
> "Q Go ahead.
>
> "A I first became acquainted with this case when a member of Mr. Goldberg's family, his son, came to the office and wanted to give me some information which he wanted me to look into with reference to Mr. Goldberg, Mr. Bernard Goldberg. When his son

began the conversation, it was obvious to me that there was going to be some information which would have to be investigated and at that particular point it would probably require the assistance of accountants or auditors or something of that nature. It may be in several jurisdictions, at least more jurisdictions than Howard County. At that particular point, I explained to young Mr. Goldberg that his father was the Public Defender; that as a result of his particular appointment as Public Defender, I in our office had to work with the elder Mr. Goldberg on a daily basis; that no matter what would happen, there would be an appearance of a conflict of interest. As a result of that at least appearance, it was my decision to refer the case to the State Prosecutor's office for assistance in whatever method may be appropriate as a result of their investigation."

* * * *

"Q Okay. Were there any other reasons why you didn't want to . . . want to . . . why you didn't want to handle this case? Did you have a personal relationship with Mr. Goldberg at any time?

"A Many, many years ago Mr. Goldberg rep . . . represented me in a civil matter.

"Q I see.

"A And I didn't . . . I just didn't think that the public would accept whatever happened as long as I was personally involved in it. So, I thought that it would be best to have some outside, impartial source look into it.

"Q But, you signed the indictment in this case.

"A Yes."

The Deputy State's Attorney for Howard County also testified as the hearing that

"one of the main reasons that we initially referred it to the . . . to the office of the State Prosecutor also was the possibility that it might involve more than

> one jurisdiction. The nature of the . . . of the complaints that we were receiving indicated that it might not be solely Howard County. So, we asked . . . we talked it over on the telephone with the . . . the [State] Prosecutor and asked him to investigate the matter."

After the Howard County State's Attorney's office requested that the State Prosecutor handle the investigation, the State Prosecutor agreed and assigned the Deputy State Prosecutor, Gerald R. Ruter, and an Assistant State Prosecutor, Bernard A. Penner, to conduct the investigation. Thereafter, the State's Attorney for Howard County also appointed Mr. Ruter and Mr. Penner as "Special Assistant State's Attorneys for Howard County," and they were administered an oath to this effect by the Clerk of the Circuit Court for Howard County. At no time were the appointments of Mr. Ruter and Mr. Penner, as Special Assistant State's Attorneys for Howard County, authorized by the Circuit Court for Howard County, the Howard County Executive, or the Howard County Council. Mr. Ruter and Mr. Penner received no compensation from the State's Attorney's office or from Howard County; their only compensation during the period of the investigation consisted of their salaries from the State Prosecutor's office.

The investigation of the allegations against Mr. Goldberg, and the presentation of evidence to the grand jury, was handled entirely by Mr. Ruter and Mr. Penner. There was no suggestion, however, that they participated in the deliberations of the grand jury. During the relevant period, except for those times when Mr. Ruter and Mr. Penner were presenting evidence to the grand jury or otherwise engaged in the Goldberg investigation, they continued to perform their other duties as Deputy State Prosecutor and Assistant State Prosecutor.

At the conclusion of the evidentiary portion of the hearing on the motion to dismiss, the legal arguments of

each side primarily focussed upon whether the State's Attorney of Howard County was authorized to appoint Messrs. Ruter and Penner as Special Assistant State's Attorneys. The State, however, also relied upon Art. 10, § 33B(c), authorizing the State Prosecutor, at the request of *inter alia*, a State's Attorney, to "investigate criminal activity . . . conducted or committed in more than one political subdivision of the State."

The circuit court denied the motion to dismiss, holding that Messrs. Ruter and Penner were authorized to present evidence to the grand jury. The grounds for the circuit court's decision were that the State's Attorney for Howard County was authorized to appoint Special Assistant State's Attorneys without the approval of the circuit court or the Howard County Executive or the County Council, and that no provision of law precluded the appointment of members of the State Prosecutor's staff as Special Assistant State's Attorneys.

Mr. Goldberg waived a jury trial and was tried before the court on a not guilty plea and an agreed statement of facts. He was found guilty on four counts of fraudulent misappropriation by a fiduciary and one count of theft over $300.00. He was sentenced to seven years imprisonment, all but two years being suspended in favor of probation for five years, and restitution was ordered.

On appeal to the Court of Special Appeals, Mr. Goldberg's sole contention was that the trial court erred in denying the motion to dismiss. He contended (1) that the State's Attorney for Howard County lacked the authority to appoint Special Assistant State's Attorneys and (2) that, in any event, members of the State Prosecutor's staff could not be appointed Special Assistant State's Attorneys. The Court of Special Appeals, rejecting these arguments and agreeing with the circuit court, affirmed. *Goldberg v. State*, 69 Md.App. 702, 519 A.2d 779 (1987). Although it held that Mr. Ruter and Mr.

Penner were authorized to appear before the grand jury as Special Assistant State's Attorneys, the intermediate appellate court noted that they were not authorized to appear before the grand jury under Art. 10, § 33B(c), as members of the State Prosecutor's staff. 69 Md.App. at 707-708 n. 2, 519 A.2d at 782 n. 2. Thereafter, this Court granted Mr. Goldberg's petition for a writ of certiorari.

A motion to dismiss an indictment ordinarily should be granted when an unauthorized person is present before the grand jury during the inquiry leading up to the indictment. *See, e.g., Lykins v. State*, 288 Md. 71, 82-83, 415 A.2d 1113, 1120 (1980); *Bartram v. State*, 280 Md. 616, 626-627, 374 A.2d 1144, 1149 (1977); *State v. Ensor*, 277 Md. 529, 356 A.2d 259 (1976); *Coblentz v. State*, 164 Md. 558, 166 A. 45 (1933). The State offers alternate arguments as to why Messrs. Ruter and Penner were authorized to present evidence to the grand jury. *First*, the State contends that under Art. V, § 9, of the Maryland Constitution, and Code (1957, 1987 Repl. Vol.), Art. 10, §§ 34 and 40(n), the State's Attorney for Howard County is authorized to appoint Special Assistant State's Attorneys without judicial approval or approval from the Howard County Government. Moreover, the State's argument continues, neither the dual office prohibition in Art. 35 of the Maryland Declaration of Rights nor the State Prosecutor law (Art. 10, § 33A, *et seq.*) precludes the appointment of the State Prosecutor or members of his staff as Special Assistant State's Attorneys. *Second*, the State alternatively argues that Messrs. Ruter and Penner were authorized to appear before the grand jury under the State Prosecutor law, Art. 10, § 33B(c), in their capacities as Deputy State Prosecutor and Assistant State Prosecutor. As previously indicated, the Court of Special Appeals agreed with the State's first argument and rejected the second argument. This Court shall affirm on the opposite basis.

We shall assume, without deciding, that the State's Attorney for Howard County is authorized generally to appoint Special Assistant State's Attorneys without either judicial approval or approval by the Howard County Government. Nevertheless, in our view, the State Prosecutor law, Art. 10, § 33A, *et seq.*, precludes the appointment of the State Prosecutor or a member of his staff as a Special Assistant State's Attorney with regard to a matter not falling within the State Prosecutor's statutory jurisdiction.

The General Assembly, in Art. 10, §§ 33B(b) and (c), carefully delineated and limited the authority and the role of the State Prosecutor in criminal investigations, even where his participation in a matter was desired by a State's Attorney. Section 33B(b) specifies four categories of criminal offenses which the State prosecutor "may . . . investigate," either on his own initiative or at the request of certain designated officials, including a State's Attorney. The allegations against Mr. Goldberg fell within none of the four categories. Section 33B(c) specifies two categories of criminal offenses which the State Prosecutor may investigate upon the request of designated officials, including a State's Attorney, but may not investigate on his own initiative. These are (1) criminal activity partly within this State and partly outside of Maryland, and (2) criminal activity conducted or committed in more than one political subdivision of this State. By carefully delineating these categories, the General Assembly obviously intended that, if a matter fell outside of subsections (b) or (c), the State Prosecutor may *not* investigate even at the request of a State's Attorney. *See, Office & Prof. Employees Int'l v. MTA*, 295 Md. 88, 96, 453 A.2d 1191 (1982) ("where a statute authorizes or permits a person or agency to take a certain type of action in a particular manner, [the authorization] becomes a mandatory limitation, and the action must be taken in conformity with it"), and cases there

cited. In this regard, courts elsewhere have limited prosecuting attorneys to the powers and duties conferred by statute. *See, e.g., Mounts v. State*, 496 N.E.2d 37, 39 (Ind. 1986), *People v. Stackpoole*, 144 Mich.App. 291, 300, 375 N.W.2d 419 (1985).

If a State's Attorney and the State Prosecutor could expand the categories set forth in § 33B by the simple expedient of having the State's Attorney's request accompanied by a designation of "Special Assistant State's Attorney," it would render meaningless the General Assembly's purpose of limiting the State Prosecutor's jurisdiction to specified categories of offenses. If this circumvention of the statutory limitations were permitted, the State Prosecutor, as "Special Assistant State's Attorney," could investigate any offense within the domain of the State's Attorney, which extends to "all cases in which the State may be interested." Art. 10, § 34. This would render the General Assembly's restriction upon the State Prosecutor's role a sham.

Moreover, a difference between a rejected draft of the State Prosecutor law and the present statute reinforces our conclusion that neither the State Prosecutor nor his assistants may be appointed as Special Assistant State's Attorneys. As initially proposed, the earlier State Prosecutor Act contained alternative versions of the Act. *See Murphy v. Yates, supra*, 276 Md. at 476 n. 2, 348 A.2d at 838 n. 2. The version that was not passed included a provision permitting the State Prosecutor to assist a State's Attorney upon request. *See* § 33B(E) of Ch. 255 of the Acts of 1975 (alternative version). Neither the adopted version nor the present act contains an equivalent provision. The General Assembly, therefore, clearly considered and rejected allowing the State Prosecutor to assist a State's Attorney whenever the State's Attorney desired such assistance.

Although Mr. Ruter and Mr. Penner were not authorized to appear before the grand jury simply because

of the State's Attorney's designation, they were authorized to appear, as Deputy State Prosecutor and Assistant State Prosecutor, under § 33B(c) of the State Prosecutor law. As previously discussed, that section authorizes the State Prosecutor, upon the request of a State's Attorney, to investigate criminal activity conducted in more than one county of this State. It is undisputed that the State's Attorney of Howard County requested the State Prosecutor to investigate the allegations against Mr. Goldberg and that one of the grounds for the request was the State's Attorney's reasonable belief that the criminal activity was conducted in more than one county. Certainly, this is all that was required under § 33B(c).[2] Moreover, the grand jury confirmed the reasonableness of the State's Attorney's belief was further confirmed by the trial, where the agreed statement of facts demonstrated criminal activity in Frederick County, and the verdict that Mr. Goldberg was guilty of criminal activity in Frederick County.[3]

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[2] Obviously, § 33B(c) does not require, before an *investigation* by the State Prosecutor is requested, that it be conclusively established that criminal activity occurred in more than one subdivision. If the State's Attorney already had such proof, the investigation would hardly be necessary. The purpose of an investigation is to explore and gather evidence.

[3] The evidence showed, and Mr. Goldberg was convicted of, among other things, fraudulent misappropriation of funds generated by the sale of land in Frederick County to the City of Frederick by a resident of Florida. Fraudulent misappropriation of funds a fiduciary is a form of embezzlement. *See* Code 1957 (1987 Repl. Vol.), Art. 27, § 132. Embezzlement may be committed in several places at several times. McBurney v. State, 280 Md. 21, 30, 371 A.2d 129 (1977). As a result, we stated in Martel v. State, 221 Md. 294, 299, 157 A.2d 437, *cert. denied*, 363 U.S. 849, 80 S.Ct. 1628, 4 L.Ed.2d 1732 (1960), that for embezzlement venue lies:

> "where the act of appropriation or conversion took place, or where the intent to embezzle was formed, or where the prop-

The Court of Special Appeals did not question that criminal activity took place in more than one subdivision within the meaning of § 33B(c). Rather, the intermediate appellate court stated: "The State Prosecutor may have had the authority to conduct the initial investigation in this matter based on a belief that the offenses committed by appellant were multi-jurisdictional in nature. However, neither he nor his assistant had the authority to go before the grand jury, that is, to commence prosecution." *Goldberg v. State*, *supra*, 69 Md.App. at 708 n. 2, 519 A.2d at 782 n. 2. Apparently the Court of Special Appeals was of the view that the "investigation" contemplated by § 33B(c) was preliminary to grand jury proceedings and did not include the presentation of evidence in front of the grand jury. We disagree. The grand jury process is an integral part of criminal investigation. As Judge W. Mitchell Digges stated for the Court in *In re Report of Grand Jury*, 152 Md. 616, 622, 137 A. 370 (1927):

> "While it is true that the grand jury has and should have the fullest inquisitorial power, yet in the exercise of such power *they are confined to an investigation of violations* of the criminal law . . . ." (Emphasis added).

And later (152 Md. at 623, 137 A. at 372-373):

> "At common law the function of the grand jury is confined to *investigations* of violations of the criminal law, and unless such *investigations* disclose facts which would constitute a recognized violation of the criminal law, they have no power or authority to criticize any particular individual or number of

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erty was entrusted, or where the accused is under an obligation to account."

See also McBurney v. State, *supra*, 280 Md. at 30, 371 A.2d at 134; Urciolo v. State, 272 Md. 607, 617, 325 A.2d 878 (1974); Pedderson v. State, 223 Md. 329, 337, 164 A.2d 539 (1960).

> individuals. If the evidence obtained *through their investigations* warrants a presentment or indictment, under the law and the oath which they are required to take, they are bound to present or indict, and if in their judgment it falls short of showing the commission of a criminal offense, they are bound to refrain from making public the results of their investigation." (Emphasis added).

See also, e.g., Unnamed Attorney v. Attorney Griev., 313 Md. 357, 364, 545 A.2d 685 (1988); *In re Special Investigation No. 281*, 299 Md. 181, 191, 473 A.2d 1 (1984); *In re Special Investigation No. 244*, 296 Md. 80, 92, 459 A.2d 1111 (1983); *In re Special Investigation No. 236*, 295 Md. 573, 578-579, 458 A.2d 75 (1983); *Bartram v. State, supra*, 280 Md. at 633, 374 A.2d at 1152.

Furthermore, the General Assembly directly authorized the State Prosecutor to appear before the grand jury in connection with investigations under §§ 33B(b) and (c). Section 33B(g) specifically states:

> "(g) *Powers and duties of State's Attorney.*—In the investigation of any case as provided in subsection (b) or (c), and the prosecution of any case as provided in subsection (e), the State Prosecutor has all the powers and duties of a State's Attorney, including the use of the grand jury in any county or Baltimore City."

The authorization of the State Prosecutor's office to investigate criminal conduct believed to have been committed in more than one subdivision clearly included the authorization to appear before the grand jury.

In this Court the petitioner Goldberg does not dispute that Messrs. Ruter and Penner were authorized to appear before the grand jury under Art. 10, § 33B(c). Rather, he asserts that the State may not now rely upon § 33B(c)

because, in the trial court, the State relied upon the designation of Messrs. Ruter and Penner as Special Assistant State's Attorneys. We need not in this case decide what the effect would have been if the State, as a matter of fact and law, had in the trial court unequivocally abandoned any reliance on the attorneys' role as members of the State Prosecutor's staff. Instead, as earlier pointed out, the State at the hearing on the motion to dismiss, both in the presentation of testimony and in argument, alternatively relied on § 33B(c) of the State Prosecutor's law. Mr. Goldberg was in no way prejudiced.

Judgment of the Court of Special Appeals Affirmed. Petitioner to Pay Costs.

APPENDIX B

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 503

September Term, 1986

BERNARD F. GOLDBERG, SR.

v.

STATE OF MARYLAND

GARRITY,
BLOOM,
WENNER,
JJ.

OPINION BY BLOOM, J.

Filed: January 13, 1987

At a non-jury trial before Judge Martin A. Wolff in the Circuit Court for Howard County, appellant, Bernard F. Goldberg, was convicted of several counts of fraudulent misappropriation and one count of statutory theft. He received a sentence of seven years, with all but two years suspended in favor of five years probation, and he was ordered to make restitution.

Appellant's sole contention on this appeal is that Judge Wolff erred in denying his motion to quash the indictment against him. That contention is supported by three

arguments, the single thrust of which is that the appearance of two unauthorized persons before the grand jury while it was conducting the inquiry leading to the indictment invalidated the indictment. William Hymes, the State's Attorney for Howard County, had appointed the Deputy State Prosecutor and an Assistant State Prosecutor as "Special Assistant State's Attorneys for Howard County" in order that they could appear before the grand jury and prosecute Mr. Goldberg. Appellant argues (1) that the State's Attorney lacked authority to appoint special assistants without prior approval by the court; (2) that the offices of Assistant (or Special Assistant) State's Attorney, Deputy State Prosecutor, and Assistant State Prosecutor are all offices for profit within the meaning of Article 35 of the Maryland Declaration of Rights, which prohibits any person from holding two offices for profit at the same time; and (3) that the Deputy and Assistant State Prosecutors could not lawfully accept appointments as Special Assistant State's Attorneys.

We disagree with appellant's arguments and, therefore, reject his contention that the indictment was invalid. Accordingly, we will affirm the judgments against him.

Facts

William Hymes, the State's Attorney for Howard County, requested assistance from the office of the State Prosecutor in investigating certain alleged criminal activities of appellant. Stephen Montanarelli, the State Prosecutor, assigned his deputy, Gerald R. Ruter, and one of his assistants, Bernard A. Penner, to the investigation. Subsequently, after the investigation yielded evidence sufficient to justify prosecution, Hymes appointed Ruter and Penner as Special Assistant State's Attorneys for Howard County, in order that they might present evidence before the grand jury, obtain an indictment, and prosecute appellant. Mr. Montanarelli approved the appointments.

Ruter and Penner were administered the oath of office of Special Assistant State's Attorney by the Clerk of the Circuit Court for Howard County. The State's Attorney did not obtain any prior written or oral authorization of these appointments from the court, nor was there any subsequent ratification of the appointments of Ruter and Penner by the court. Neither the County Executive nor the County Council of Howard County gave Hymes any specific authority to appoint, name or designate Ruter and Penner as Special Assistant State's Attorneys.

Ruter and Penner, purporting to act solely in their capacities as Special Assistant State's Attorneys, appeared before the grand jury and presented to it evidence that resulted in the multi-count indictment against appellant. There is no contention that Ruter and Penner participated in the actual deliberations of the grand jury. Although the indictment was signed by the State's Attorney, neither Hymes nor his deputy nor any of his regular full time assistants participated in the presentation to the grand jury.

Except for the periods of time they were actually appearing before the grand jury or engaged in the prosecution of the case against appellant (when they were purportedly acting as Special Assistant State's Attorneys for Howard County), Ruter and Penner continued to act and regard themselves as Deputy and Assistant State Prosecutor. They received no compensation whatsoever from the State's Attorney's Office for the duties performed while acting in their capacity as Special Assistant State's Attorneys; instead, throughout their participation in this matter, Ruter and Penner received their usual compensation as employees of the office of the State Prosecutor. The State Prosecutor made no effort to seek reimbursement from the State's Attorney's Office for the services performed by Ruter and Penner during the course of their participation in the investigation and trial of appellant.

At the hearing on appellant's motion to dismiss, Hymes proffered several reasons for requesting the assistance of the State Prosecutor's Office in this matter. At the time investigation into appellant's allegedly criminal activities was begun, appellant was employed as the Public Defender of Howard County. Hymes testified that he was reluctant to become involved in the matter in that there might be at least an appearance of a conflict of interest because the Public Defender and State's Attorney's staffs had contacts on a daily basis and because Goldberg had represented Hymes many years previously in a civil matter. Hymes also testified that he initially thought that the State Prosecutor might have jurisdiction over the investigatory phase in that there was a possibility the alleged offenses were multi-jurisdictional in nature. Dwight Thompson, Deputy State's Attorney for Howard County, testified that it became apparent at a later date that the bulk of the alleged criminal activity took place in Howard County. Thompson additionally proffered that the State's Attorney's Office hoped to minimize the damage to appellant's reputation by having persons outside the regularly paid staff of the State's Attorney investigate appellant's purported criminal activity.

I

It is well-established that an indictment is ineffective whenever persons who are not legally authorized to appear before the grand jury have been present during the inquiry leading up to the indictment. *Coblentz v. State*, 164 Md. 558, 568 (1933). *See also State v. Ensor & Compton*, 277 Md. 529, 533 (1976). This is so even where there has been no allegation of injury, and no corrupt or unlawful means have been employed. *Coblentz, supra*, 164 Md. at 568.

If one is authorized to appear before the grand jury in any single capacity, however, the fact that he is unauthorized to appear in another or different capacity will

not serve to invalidate the indictment. *Ensor & Compton, supra*, 277 Md. at 538.

In the case at hand, the State has not contended on appeal,[1] nor could it,[2] that Ruter and Penner were authorized to attend the grand jury in their capacities as Deputy State Prosecutor and Assistant State Prosecutor. Thus, the validity of the indictment turns on whether Ruter and Penner were properly before the grand jury in their capacities as Special Assistant State's Attorneys.

Appellant's first contention is that the State's Attorney does not have the power, solely on his own authority, to

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[1] The State concedes in its brief that "in this case [Ruter and Penner] were not acting as State Prosecutors, they were sworn in specifically as Special Assistant State's Attorneys to investigate and prosecute this case."

[2] Art. 10, § 33B (1981 Repl. Vol.) prescribes the duties and powers of the State Prosecutor. There being no contention that the offenses under investigation involved any of the crimes enumerated in subsection (b), (violations of State election laws, the State Public Ethics Law, bribery laws, extortion, perjury, obstruction of justice, or malfeasance, misfeasance or nonfeasance in office), subsection (c) provides the only possible basis for the State Prosecutor's jurisdiction over this matter. It states, in part, that "At the request . . . of a State's Attorney, the State Prosecutor may *investigate* criminal activity . . . which is conducted or committed in more than one political subdivision of the State." (Emphasis added.) The State Prosecutor may have had the authority to conduct the initial investigation in this matter based on a belief that the offenses committed by appellant were mulijurisdictional in nature. However, neither he nor his assistant had the authority to go before the grand jury, that is, to commence prosecution of appellant. Subsection (e) authorizes the State Prosecutor to prosecute an alleged criminal violation under subsection (c) only where the State's Attorney has failed within 45 days after receipt of the State Prosecutor's findings to file charges and commence prosecution in accordance with the State Prosecutor's recommendation. That was the case here. Rather, the record below indicates that Ruter and Penner were appointed Assistant State's Attorneys after it was determined that the alleged offenses were committed primarily in Howard County and an apparent conflict of interest was perceived by the State's Attorney.

appoint Special Assistant State's Attorneys to prosecute an action, so that the appearance of Ruter and Penner before the grand jury was unauthorized.

An examination of the role of the State's Attorney under Maryland law, we believe, compels a contrary conclusion.

The State's Attorney is a constitutional officer. Md. Const. Art. V, § 7. *Murphy v. Yates*, 276 Md. 475, 488 (1975). Article V, Section 9 of the Maryland Constitution, as amended in 1976,[3] provides in part that "The State's Attorney shall perform such duties and receive such salary as shall be prescribed by the General Assembly." Article 10, Section 34 of the Md. Ann. Code (1981 Repl. Vol.) implements these constitutional provisions. *State v. Aquilla*, 18 Md. App. 487, 493 (1973). It provides that "The State's attorney for each county

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[3] Prior to its amendment in 1976, Md. Const. Art. V, § 9 provided that "The State's Attorney shall perform such duties and receive such salary as shall be prescribed by law. . . ." The 1976 amendment was approved in the wake of Murphy v. Yates, 276 Md. 475 (1975), in which the Court of Appeals held that the State Prosecutor Act, art. 10, §§ 33A-33F of the Md. Ann. Code, unconstitutionally infringed upon the discretionary power of the State's Attorney to prosecute and defend cases. The Court concluded from a historical review of the office of the State's Attorney that the State's Attorney had inherited the common law prosecutorial powers, duties, and broad discretionary authority of the Attorney General. The "duties" which were "prescribed by law" under then Art. V, § 9 referred solely to the constitutional grant to the State's Attorney of the common law powers which had historically devolved upon the State's Attorney. The Court rejected contentions that Art. V, § 9 authorized a divestiture of those powers and duties, noting that the draftsmen intended only to permit the Legislature to set the salary of the State's Attorney from time to time. In view of the constitutional stature of the office of State's Attorney, the Court held that the Legislature could not limit or modify the State's Attorney's powers or duties by transferring them to the office of the State Prosecutor. The State Prosecutor Act was reinstated on ratification of the 1976 Amendment to Art. V, § 9 of the Constitution.

and the City of Baltimore shall . . . prosecute and defend, on the part of the State, all cases in which the State may be interested subject to the provisions of § 33B [Duties of the State Prosecutor] of this article." The Court of Appeals has held that this is the only statute which "purports to delimit the authority of the State's Attorney. . . ." *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 213 (1978). Under the current constitutional scheme,[4] the office of State's Attorney is "possessed of no other powers than those prescribed by the constitutions [sic] and statutes of the State." *Aquilla, supra*, 18 Md. App. at 493; *Hawkins v. State*, 81 Md. 306, 310 (1985); *Kilgour v. The Evening Star Newspaper Co.*, 96 Md. 16, 29 (1902). Those powers, however, are nowhere defined or enunciated. *Aquilla, supra*, 18 Md. App. at 493; *Wells v. Price*, 183 Md. 443, 446 (1944). The courts have held, nevertheless, that the State's Attorney is vested with the broadest official discretion to institute and prosecute criminal causes. *Food Fair, supra*, 28 Md. at 213; *Ewell v. State*, 207 Md. 288, 296 (1955); *Brack v. Wells*, 184 Md. 86, 90 (1944); *Aquilla, supra*, 18 Md. App. at 493.

To fulfill his constitutional and statutory mandate, a State's Attorney may generally assign to his deputies

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[4] The Court of Appeals in *Murphy, supra*, note 3, overruled prior decisions to the extent they implied that since the office of State's Attorney was unknown at common law, the State's Attorney was possessed of no other powers than those prescribed by the constitution and statutes, 238 Md. at 488 (discussing State v. Hunter, 10 Md. App. 300, *cert. denied*, 263 Md. 17 (1970); Kilgour v. The Evening Star Newspaper Co., 96 Md. 16 (1902); Hawkins v. State, 81 Md. 306 (1895)). The likely effect of the 1976 amendment to Art. V, § 9 was to make valid, once again, the proposition that the duties and powers of the State's Attorney derive solely from the constitution and legislative enactments. *See Survey of Maryland Court of Appeals Decisions 1975-1976, State Prosecutor Act Held Unconstitutional*, 38 Md. L. Rev. 81, 96 (1977) (if the powers of the State's Attorney are to be "prescribed by the General Assembly," literal reading of phrase would indicate State's Attorney no longer has any common law powers).

and assistants the duties required of him by law, subject to his discretion and control. *Aquilla, supra*, 18 Md. App. at 494; *Matter of Anderson*, 20 Md. App. 31, 49 (1974). And such deputies and assistants may, at the assignment of the State's Attorney, attend the grand jury. *Aquilla, supra*, 18 Md. App. at 494.

In *Aquilla*, we noted that under art. 10, sec. 40, the General Assembly had explicitly granted to the deputies and/or assistants of State's Attorneys in certain counties the same legal powers of the State's Attorney to represent the State before grand juries. We found the failure of the Legislature explicitly to grant this power to deputies or assistants of State's Attorneys in other counties did not mean they could not attend the grand jury. Rather, we held such authority was implicit in the mandate of art. 10, sec. 34 that the State's Attorney "prosecute and defend" all cases in which the State may be interested. 18 Md. App. at 494, 495.

It has similarly been established that Special Assistant State's Attorneys who have been properly appointed and enjoy a status sufficiently comparable to that of Assistant State's Attorney may attend the grand jury. *Id.* at 495-96.[5]

We shall hold in this case that the authority of a State's Attorney to appoint Special Assistant State's Attorneys is implicit in the statutory mandate of article 10, section 34.

The fact that the General Assembly, by art. 10, section 40, has been explicit in granting certain State's Attorneys the authority to appoint temporary or Special

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[5] This is true irrespective of whether the special assistants received compensation, spent full time in their duties and were not answerable to the State's Attorney for the time spent on matters not assigned by the State's Attorney. *Id.* at 496.

Assistant State's Attorneys,[6] but has not done so in other cases does not mean the State's Attorneys of other counties are not similarly empowered. By analogy to the holding in *Aquila*, we conclude that the Legislature has merely given explicit recognition under some subsections of art. 10, section 40 to a power already implicit under art. 10, section 34. This does not mean, however, that there are no limitations whatsoever in the State's Attorney's ability to appoint special assistants. Article 10, section 40 establishes certain limitations on the appointment of deputies and assistants by the State's Attorneys of the various counties. The number of deputies or assistants the State's Attorney may appoint, their salaries and, in some instances, the method of appointment vary from county to county.[7]

The provisions applicable to this case are contained in subsection 40(n)(3), which states, in part, that the State's Attorney for Howard County "may appoint such Assistant State's Attorneys as may be authorized by the county executive and whose salaries shall be set by the county executive with the approval of the County Council."

We do not view this provision as being the source of the State's Attorney's power to appoint assistants, regu-

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[6] Article 10, § 40(c)(7) provides that the State's Attorney for Anne Arundel County "may from time to time, if considered necessary, with the approval of the administrative judge of the Circuit Court for Anne Arundel County, appoint a temporary assistant State's Attorney for a particular case or series of cases. . . ." Subsection 40(w)(7) provides that the State's Attorney for Wicomico County "with the prior approval of the resident judge . . . and the Wicomico County Council, may appoint additional special assistant State's Attorneys he considers necessary, to serve for a particular case or series of cases, upon salaries, terms and conditions to be set and approved by the Wicomico County Council."

[7] Similar provisions with respect to Baltimore City appear in Art. V, § 9 of the Md. Const.

lar or special; as we have said, that power stems from art. 10, section 34. Rather, subsection (n)(3) imposes a budgetary limitation on the authority of the State's Attorney. He may appoint only as many assistants as are authorized by the County Executives and at the salaries set by the County Executive with the approval of the County Council. This conclusion is buttressed by the fact section 40 is entitled "Salaries and expense allowances of county State's Attorneys." *See also Aquilla, supra*, 18 Md. App. at 494-95 n.8 (legislation providing for the *number* and *salary* of State's Attorneys' deputies and assistants in the various counties was enacted as need for them was demonstrated to Legislature's satisfaction).

It is conceded by the State that the Howard County Executive gave no specific authorization for the appointment of Ruter and Penner. Nevertheless, we do not read subsection 40(n)(3) as mandating the County Executive's prior approval of the particular individuals selected by the State's Attorney to serve as his assistants. We will not infer any intention on the part of the General Assembly to vest the County Executive with a power to veto the individuals selected by the State's Attorney to act as his assistants.

Since Ruter and Penner received no compensation from the State's Attorney's office, their appointments obviously could not have exceeded any budgetary limitations. Nor is there anything in the record to indicate that the appointments exceeded any numerical authorization. The budgets submitted by the State's Attorney and approved by the County Executive and Council specified the number of full time employees, including Assitant State's Attorneys of varying categories, and the total sum of money payable in salaries, but made no mention of "Special" (or part-time) Assistant State's Attorneys. There was a specific line in the budget for "Contractual Services" which, according to the evidence, was frequently used to

compensate not only accountants and other experts hired on a case-by-case basis when specialized assistance was needed but also Special Assistant State's Attorneys engaged on a part-time basis to prosecute individual cases where the State's Attorney believed that prosecution by a member of his regular staff would be inappropriate or inadvisable. The fact that the County Executive had never objected to that use of the "Contractual Services" funds we construe as tacit approval of the practice. By expressly approving the State's Attorney's budget provision for "Contractual Services" and tacitly approving the use of such funds to hire special assistants as the need arose, the County Executive had authorized the appointment of an unlimited number of Special Assistant State's Attorneys with restriction only as to costs.

Appellant argues that a Special Assistant State's Attorney is a "Special Prosecutor" and can only be appointed in certain specified ways. For that proposition, he relies on *Lykins v. State*, 288 Md. 71, 86 (1980), wherein the Court of Appeals held:

> The appointment of a special prosecutor may be accomplished in one of three ways. (1) The trial court may invoke the powers vested in it under . . . § 2-102 (a) [of the] Courts and Judicial Proceedings Article and designate some attorney as assistant counsel for the State. (2) As was done in *State v. Ensor and Compton* [citation omitted] the Attorney General may be requested to designate one of his assistants to be appointed by the trial court as assistant counsel for the State. (3) The State's Attorney may request the Governor to require the Attorney General under Constitution Article V, § 3 to aid the State's Attorney in prosecuting the action.[8]

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[8] Sec. 2-102(a) provides in part that "If advisable in a specific proceeding, a court may appoint . . . assistant counsel for the States . . . and may require his presence in court." Md. Const. Art. V, § 3(a)(3) provides that the Attorney General shall "when

Appellant's reliance on *Lykins* is misplaced for several reasons. First, the above-quoted language was pure *dicta*. In *Lykins*, the lower court had dismissed an indictment on the ground that the State's Attorney appearing before the grand jury had represented the accused in a civil matter at a time she was cohabitating with the victim of the alleged crimes. 288 Md. at 71. The Court of Appeals held that in the absence of indications that the prosecution was brought for improper motives, the remedy was not to bar the prosecution, but to supplant the prosecutor. *Id.* at 85. In this context, the Court went on to suggest several methods which might be employed to supplant a State's Attorney where the facts were "sufficiently grave" to merit replacement. *Id.* at 85-86.

In *Young v. State*, 52 Md. App. 550, 553-54 (1982), *aff'd* 297 Md. 286 (1983), we referred to the *Lykins dicta* in support of our conclusion that the entire staff of a county State's Attorney's office is not disqualified from prosecuting a criminal case where one member of the staff, prior to his appointment as Assistant State's Attorney, had represented the defendant in the case. We stated:

> Should we adopt [such a] *per se* rule . . . considerable difficulties could arise in the prosecution of any case in which a former defense counsel has later joined the prosecutorial staff. . . . In every such situation, either assistant counsel for the State would have to be appointed under § 2-102(a) . . . or one of the other alternatives noted in *Lykins v. State* (citation omitted) would have to be invoked. Even greater difficulties could arise in connection with the institution of criminal proceedings since assistant

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required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing and prosecuting any criminal suit or action . . . brought by the State in any court of this State."

counsel for the State does not have the power to institute them.

Neither *Lykins* nor *Young* purport in any fashion to delineate or define the power of the State's Attorney to appoint Special Assistant State's Attorneys. Both only peripherally touched the question of what *might* be done in a *post-indictment* situation to replace a State's Attorney. They did not deal with the validity of a pre-indictment appointment by the State's Attorney of Special Assistant State's Attorneys to avoid any appearance of impropriety.[9]

Furthermore, appellant's reliance on *Lykins* is based upon the erroneous conclusion that an "assistant counsel for the State" appointed by the court and a Special Assistant State's Attorney appointed by the State's Attorney are equivalent offices. A Special Assistant State's Attorney is imbued with all the powers of a State's Attorney and may institute criminal proceedings, either by way of indictment or information. He is a member of the State's Attorney's staff, subject to the State's Attorney's control, and receives any compensation to which he is entitled from the State's Attorney. A Special Prosecutor in the form of assistant counsel for the State, however, is not a member of the State's Attorney's staff and operates independently of it. The court, not the State's Attorney, determines the amount of compensation to which assistant counsel is entitled. § 2-102(b), Courts & Judicial Proceedings (1984 Repl. Vol.). Where a member of the Attorney General's staff is authorized to act as a Special Prosecutor at the direction of the Governor or General Assembly, pursuant to Art. V, § 3 of the Maryland Constitution, such prosecutor remains a member of

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[9] Appellant has never alleged that he was prosecuted for improper motives or that the appearance of the particular Assistant State's Attorneys presented any conflict of interest such that their replacement was warranted.

the Attorney General's staff and is subject to the Attorney General's control.

An assistant counsel for the State appointed by the court under § 2-102(a) of the Courts & Judicial Proceedings Article cannot be imbued with all the powers of a State's Attorney. In *Babbit v. State*, 294 Md. 134 (1982), the Court held that section 2-102(a) of the Courts & Judicial Proceedings Article did not empower the court to appoint assistant counsel for the State to initiate prosecution by filing a criminal information. *Id.* at 140. This was so notwithstanding the fact that the State's Attorney had requested the appointment of assistant counsel to avoid the appearance of a conflict of interest. *Id.* at 135. The Court reasoned that the constitutional prerogative of the State's Attorney to determine who, when and whether to prosecute would be undermined if the court could confer this authority under the auspices of § 2-102(a). *Id.* at 138. The State's Attorney, moreover, was not entitled to "abrogate his constitutionally prescribed duty by simple acquiescence" in the appointment. *Id.* at 139.[10]

Prior to its decision in *Babbitt*, the Court of Appeals, in *State v. Ensor and Compton*, *supra*, held that assistant counsel for the State, appointed pursuant to § 2-102(a) of the Courts and Judicial Proceedings Article, could lawfully appear before the grand jury. 277 Md. at 548. The Court expressed concern that:

> In the absence of such a holding and in the absence of a directive to the Attorney General to participate in an investigation [pursuant to Md. Const. Art. V, § 3] *courts* would be without authority to appoint an acting prosecutor or assistant counsel for the

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[10] The Court additionally based its holding on the Maryland Rules of Criminal Procedure. Rule 702(d) provided that a charging document could only be filed by the State's Attorney. The charging document, under Rule 702(a) included a criminal information. *Babbitt*, *supra*, 294 Md. at 137.

> grand jury phase of any matter since their authority to appoint under . . . Art. 10, § 41 is limited to instances where the appointment is "necessary from the absence, sickness, resignation or death of any State's attorney."

Id. (emphasis added).

By empowering the courts to appoint counsel authorized to appear before the grand jury and there exercise powers equivalent to those of a State's Attorney, the Legislature did not deprive the State's Attorney of his power (subject to the limitations of art. 10, § 40) to appoint qualifying special assistants.

We do not believe that such an interpretation renders § 2-102(a) "virtually meaningless," as appellant contends. Both the courts and the State's Attorney, subject to statutorily prescribed limitations, may appoint special counsel to represent the State by appearing before the grand jury and prosecuting persons accused of crime.

If a situation arises in which the State's Attorney has failed to appoint a special assistant in a case in which he and his staff ought not prosecute, section 2-102(a) provides a necessary safeguard by empowering the court to appoint assistant counsel for the State. Or, if a special prosecutor is deemed necessary or appropriate and there are no funds in the State's Attorney's budget to pay for such services, the court may appoint counsel and require the county to pay his or her fee for representing the State.

In summary, the Howard County State's Attorney had the authority to appoint Special Assistant State's Attorneys under art. 10, § 34 of the Md. Ann. Code. Such appointments did not violate the limitations proscribed in art. 10, § 40(n)(3) of the Code. Court approval of the appointments was not necessary under § 2-102(a) of the Courts & Judicial Proceedings Article.

II

Article 35 of the Maryland Declaration of Rights provides in part that "no person shall hold at the same time, more than one office of profit, created by the Constitution or Laws of this State. . . ." Appellant contends that the appointment of Messrs. Ruter and Penner as Special Assistant State's Attorneys while they occupied positions within the Office of the State Prosecutor violated Article 35's prohibition. We need not determine whether the relevant positions were offices of profit, however. It is well-established under Maryland law that the effect of accepting a second office of profit while already holding one office is simply to vacate the former office. *Moser v. Board of County Commissioner of Howard County*, 235 Md. 279, 284 (1964); *Hetrich v. County Commissioners of Anne Arundel County*, 222 Md. 304, 308 (1960); *Truitt v. Collins*, 122 Md. 526, 530 (1914). Even assuming *arguendo* the positions involved herein were offices of profit, the effect of Ruter's and Penner's acceptance of appointments as Special Assistant State's Attorneys would only have been to vacate their former offices as Deputy/Assistant State Prosecutors. Their authority to act in the capacity of Special Assistant State's Attorneys would be unaffected. It necessarily follows that any violation of Article 35 resulting from their occupation of two offices of profit would not render the indictment defective.

III

Appellant's final contention is that Messrs. Ruter and Penner were ineligible for appointment as Special Assistant State's Attorneys in that (1) the appointment was in contravention of art. 10, sec. 33B of the Md. Ann. Code, circumscribing the jurisdiction of the State Prosecutor; (2) the appointments violated the mandate of art. 10, § 33B(k) that the State Prosecutor and the attorneys on his staff "shall devote full time to their official duties"; and (3) the appointment is violative of

art. 10, sec. 33A(a) which states that the "office of State Prosecutor is created as an independent unit within the office of the Attorney General."

At common law, if an officer eccepts a second office which is incompatible with the first, he vacates the first. *Hetrich, supra*, 222 Md. at 308; *Lilly v. Jones*, 158 Md. 260, 265 (1930). The courts have qualified the general rule where the individual is *ineligible* to hold the second office. In such a case, the attempted appointment is a nullity and the purported acceptance of the second position illusory. *Hetrich, supra*, 222 Md. at 308.

Ineligibility generally refers to lack of qualification for an office. In *Kimble v. Bender*, 173 Md. 608 (1938), Kimble was appointed Justice of the Peace of Allegany County, an office created while he was a State Senator, The Court held he was ineligible for appointment as a justice in that sec. 17 of Art. III of the Maryland Constitution specified that no senator could "be eligible to any office which shall have been created . . . during [the] term" for which he was elected. For reasons of public policy, a member of an appointing body is also "ineligible for appointment to a conflicting office by that body." *Hetrich, supra*, 222 Md. at 309 (and cases cited therein).

There was no statutory or constitutional provision prohibiting either Ruter or Penner from becoming a member of the Howard County State's Attorney's staff. Nor are we aware of any legislatively prescribed qualifications for the office of Special Assistant State's Attorneys which Messrs. Ruter and Penner failed to fulfill. Finally, we do not believe any considerations of public policy would preclude them from accepting positions as special assistants to the State's Attorney for Howard County. *Cf. Hetrich, supra*, 222 Md. at 309.

The most that could be said in favor of appellant's position is that the office of Special Assistant State's Attorney is incompatible with the office of either Deputy or Assistant State Prosecutor.

The courts have not settled on a single test to determine the incompatibility of offices. In *Lilly v. Jones*, *supra*, the Court of Appeals noted:

> One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, or is subject to supervision by the other, or where a contrariety and antagonism would result in the attempt by one person to discharge the duties of both.

158 Md. at 266. The test has additionally been phrased as "whether the two offices are compatible in their natures in the rights, duties or obligations connected with or flowing out of them." *Id.* Another test of incompatibility is the "character and relation of the offices; as where one is subordinate to the other, and subject in some degree to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant." *Hetrich*, *supra*, 222 Md. at 308; *Lilly*, *supra*, 158 Md. at 266.

A logical argument could certainly be made that the offices of Deputy and Assistant State Prosecutor and that of Special Assistant State's Attorney are "inherently inconsistent and repugnant." The State Prosecutor and his staff must operate within the limited jurisdictional framework of art. 10, sec. 33B. As discussed elsewhere in this opinion, the State Prosecutor's authority to prosecute those offenses within his jurisdiction, after the investigation phase had been completed (with certain exceptions immaterial here) is limited under sec. 33B(e) to situations in which the State's Attorney has failed to act. There is obviously an interplay between the two offices because the State's Attorney is authorized to act on the State Prosecutor's recommendations for action for offenses committed which are within the latter's jurisdic-

tion. Nonetheless, the two offices are *independent* of each other and operate within *distinct* spheres.

Moreover, an individual who is a member of both offices serves not one but two masters and is simultaneously subject to the supervisory control of both the State Prosecutor and the State's Attorney. We can only hypothesize the difficulties which might arise if the two masters had differing concepts respecting the prosecution of a particular cause. We are not suggesting that any such difficulties were apparent in this case; nevertheless, the offices are incompatible because incompatibility is not to be determined by the power actually exercised by the holder of the office but by the power he *may* exercise.

Finally, as appellant has pointed out, members of the State Prosecutor's staff are required under art. 10, sec. 33B(k) to devote full time to their duties. It is difficult to see how one could devote full time to one's duties and obligations to the State Prosecutor when he is otherwise occupied in performing his duties as a Special Assistant State's Attorney, particularly since the duties of the latter office could not be performed by a member of the former office. There was testimony below that Ruter and Penner worked on appellant's case during "regular" and "irregular" hours. Every minute of every "regular" hour spent in prosecuting appellant's case as an assistant to the State's Attorney was time Ruter and Penner were required by art. 10, sec. 33B to be devoting to performing their duties as assistants to the State Prosecutor.

Nevertheless, even if we were to hold that the offices were incompatible, it would avail appellant nought. Such holding would not mean that Ruter and Penner could not be appointed Special Assistant State's Attorneys; only that by accepting the appointments they vacated their offices as Deputy and Assistant State Prosecutor. *Hetrich, supra*, 222 Md. at 380; *Lilly, supra*, 158 Md. at 265. We need not decide what the consequences of their va-

cating their former positions would be; that question is not before us. We need merely conclude, as we do, that although incompatibility between the offices of Deputy or Assistant State Prosecutor and that of Special Assistant State's Attorney might possibly invalidate certain actions taken by them on behalf of the State Prosecutor, it cannot invalidate the indictments in this case.

Since the State's Attorney for Howard County had the authority to appoint Ruter and Penner as Special Assistant State's Attorneys and Ruter and Penner were not prohibited by costitution, statute or common law from accepting the appointments, the indictment against appellant was not defective by reason of the appearance of Ruter and Penner before the grand jury. Accordingly, Judge Wolff properly denied appellant's motion to quash the indictment.

Judgments Affirmed.

Costs To Be Paid by Appellant.

APPENDIX C

IN THE COURT OF APPEALS OF MARYLAND

No. 43

September Term, 1987

BERNARD P. GOLDBERG, SR.

v.

STATE OF MARYLAND

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of *Bernard P. Goldberg, Sr. v. State of Maryland* came before you and wherein the judgment of the said Court of Special Appeals was duly entered on the thirteenth day of January, 1987 as appears from the transcript of the record of the said Court of Special Appeals which was brought into the Court of Appeals by virtue of a writ of certiorari dated May 22, 1987; and

WHEREAS in the September Term, 1987 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on April 12, 1989 by this Court that the judgment of the Court of Special Appeals be affirmed. Petitioner to pay costs.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the cause in conformity with the judgment of this Court as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS The Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland, this twenty-six day of May, 1989.

/s/ Alexander L. Cummings
Clerk
Court of Appeals of Maryland

Costs:

Petition filing fee	$ 30.00
Filing fee in Court of Special Appeals	50.00
Appellant's brief	158.40
Joint record extract	825.60
Appellee's brief	206.40
Appearance fee of appellant	10.00
Appearance fee of appellee	10.00
Motion for reconsideration	25.00
TOTAL COSTS	$1,315.40

[SEAL]

APPENDIX D

[SEAL]

COURT OF APPEALS
OF MARYLAND

Courts of Appeal Building
Annapolis, Md. 21401-1699

974-3341
Washington Area 261-2999

May 26, 1989

Lewis Straughn Nippard, Esquire
3701 Court House Drive
Ellicott City, MD 21043

RE: *Bernard P. Goldberg, Sr. v. State of Maryland*
No. 43, September Term, 1987

Dear Mr. Nippard:

Please be advised that the motion for reconsideration filed in the above entitled case was denied by the Court on May 26, 1989.

A copy of the mandate is enclosed herewith.

Very truly yours,

/s/ Alexander L. Cummings
ALEXANDER L. CUMMINGS
Clerk

ALC:bmd
Encl.
cc: Ronald M. Levitan, Esquire

APPENDIX E

[SEAL]

CIRCUIT COURT FOR HOWARD COUNTY
Clerk's Office
C. Merritt Pumphrey, Clerk

992-111-2-3-4-5-6
Ellicott City, MD. 21043

Re: MANDATE FROM COURT OF APPEALS/SPECIAL APPEALS

Case No.: 14048

Appellant Bernard F Goldberg, Sr.

Mandate Filed June 7, 1989

Disposition Judgment affirmed.

Copies Mailed June 7, 1989

Copy:

Hon. Martin A Wolff
Hon. J. Thomas Nissel
Hon. Raymond J. Kane, Jr.
Hon. Cornelius F. Sybert, Jr.
Hon. James B. Dudley

State's Attorney Howard County
& Gerald C. Ruter and
Bernard A. Penner
s-103 The Investment Bldg
1 Investment Place
Towson, Md. 21204

BONDSMAN
Howard L Muhl
2 Stanley Drive
Balto Md. 21228

Attorney/Or Proper Person (Proper Person if on Bond or Pro Se)

Lewis S Nippard, Esq
3701 Court House Drive
Ellicott City Md 21043

Sheriff (if applicable) (If defendant is to surrender for incarceration)

Correctional Institution

(if applicable) (IF defendant to be incarcerated after appeal)

_____

_____

Order Executing Sentence XX YES —— No

APPENDIX F

IN THE CIRCUIT COURT
FOR HOWARD COUNTY
March Term, 1985

STATE OF MARYLAND

vs.

BERNARD F. GOLDBERG, SR.

Indictment—(1), (2), (3), (5) & (6) Fraudulent Misappropriation by a Fiduciary—27/132; (4) Commingling Client's Funds—10/44; (7) Theft Over Three Hundred Dollars—27/342

(True Bill

/s/ William R. Bird
Foreman

Witnesses:

Marcelino V. Ferrer, Special Agent
Det. Sgt. Henry E. Black, M.S.P.

NOTICE

TO THE PERSON CHARGED:

1. This paper charges you with committing a crime.

2. If you have been arrested, you have the right to have a judicial officer decide whether you should be released from jail until your trial.

3. You have the right to have a lawyer.

4. A lawyer can be helpful to you by:

(A) explaining the charges in this paper;

(B) telling you the possible penalties;

(C) helping you at trial;

(D) helping you protect your constitutional rights; and

(E) helping you to get a fair penalty if convicted.

5. Even if you plan to plead guilty, a lawyer can be helpful.

6. If you want a lawyer but do not have the money to hire one, the Public Defender may provide a lawyer for you. The court clerk will tell you how to contact the Public Defender.

7. If you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court clerk as soon as possible.

8. DO NOT WAIT UNTIL THE DATE OF YOUR TRIAL TO GET A LAWYER. If you do not have a lawyer before the trial date, you may have to go to trial without one.

NOTICE

Filed 19—

STATE OF MARYLAND,

HOWARD COUNTY, TO WIT:

The Grand Jurors for the State of Maryland, for the body of Howard County, on their oath present that BERNARD F. GOLDBERG, SR., late of the County aforesaid, during the period beginning on or about March 27, 1984, and continuing until April 12, 1984, in the County aforesaid, while acting in the capacity of a fiduciary, to wit: President of the Title Company of Howard Co., Inc., holder of money deposited by Marshall Belaga for the purchase of the real property known as 3691 Park Avenue, Ellicott City, did unlawfully, fraudulently and wilfully appropriate to a use and purpose not in the due and lawful execution of his trust for and on behalf of said Marshall Belaga, money of the value of ten thousand dollars and no cents ($10,000.00) which came into his hands as such fiduciary, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

(Article 27, Section 132—Fraudulent Misappropriation by Fiduciary)

COUNT TWO

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said BERNARD F. GOLDBERG, SR., during the time period beginning on or about April 23, 1984, and continuing until June 14, 1984, in the County aforesaid, while acting in the capacity of a fiduciary, to wit: President of the Title Company of Howard County, Inc., settlement agent for the purchase of the real property known as 3602B Joycin Court, Ellicott City, by Ming K. Liu and Jan Fen Liu, his wife, from Glenwood Realty, Inc., did unlawfully, fraudulently and wilfully appropriate to a use and purpose not in the due and lawful execution of his trust for and on behalf of said Glenwood Realty, Inc., money of the value of fifty-seven thousand five hundred and seven

dollars and no cents ($57,507.00), which came into his hands as such fiduciary; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

(Article 27, Section 132—Fraudulent Misappropriation by Fiduciary)

COUNT THREE

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said BERNARD F. GOLDBERG, SR., for the period beginning on or about June 14, 1984, continuing to and including July 18, 1985, in the County aforesaid, while acting in the capacity of a fiduciary, to wit: agent for Sol Sheintal, the seller of approximately 75.553 acres of land located in Frederick County, Maryland, did unlawfully, fraudulently and wilfully appropriate to a use and purpose not in the due and lawful execution of his trust for and on behalf of said Sol Sheintal, money of the value of four hundred eighty-eight thousand eight hundred twenty-five dollars and no cents ($488,825.00), which came into his hands as such fiduciary; contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State.

(Article 27, Section 132—Fraudulent Misappropriation by a Fiduciary)

COUNT FOUR

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said BERNARD F. GOLDBERG, SR., on or about July 23, 1984, in the County aforesaid was an attorney licensed to practice law in the State of Maryland and as such was entrusted with and received and accepted one hundred twenty-five thousand dollars and no cents ($125,000.00) from the City of Frederick as deposit money for the purchase of approximately 75.553 acres belonging to Sol Sheintal, did unlawfully and wilfully commingle said one hundred and

twenty-five thousand dollars ($125,000.00) by unlawfully and wilfully failing to expeditiously deposit in an account maintained as a separate account the said money by commingling said money with his own funds, and using said money for a purpose other than the purpose for which said money was entrusted to the said BERNARD F. GOLDBERG, SR. without any written instructions or court order; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

(Article 10, Section 44—Commingling Client's Funds)

COUNT FIVE

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said BERNARD F. GOLDBERG, SR., for the period beginning on or about April 16, 1985, and continuing until July 18, 1985, in the County aforesaid, while acting in the capacity of a fiduciary, to wit: President of the Title Company of Howard County, Inc., settlement agent for the purchase of the real property known as 3701 Century Avenue, Baltimore County, by Larry E. Horsey and Sarahlee S. Horsey, his wife, from William A. Lippincott and Peggy F. Lippincott, his wife, did unlawfully, fraudulently and wilfully appropriate to a use and purpose not in the due and lawful execution of his trust for and on behalf of said William A. Lippincott and Peggy F. Lippincott, money of the value of fifty-eight thousand nine hundred and five dollars and forty-one cents ($58,905.41) which came into his hands as such fiduciary; contrary to the form of the Act of Assembly, in such case made and provided and against the peace, government and dignity of the State.

(Article 27, Section 132—Fraudulent Misappropriation by a Fiduciary)

COUNT SIX

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said BERNARD F. GOLDBERG, SR., on or about October 26, 1984, in the County aforesaid, while acting in the capacity of a fiduciary, to wit: Personal Representative of the Estate of Edward Gick, did unlawfully, fraudulently and wilfully appropriate to a use and purpose not in the due and lawful execution of his trust for and on behalf of said Estate of Edward Gick, money of the value of twenty-four thousand dollars and no cents ($24,000.00), which came into his hands as such fiduciary; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

(Article 27, Section 132—Fraudulent Misappropriation by a Fiduciary)

COUNT SEVEN

And the Grand Juors aforesaid, upon their oath aforesaid, do further present that the said BERNARD F. GOLDBERG, SR., on or about June 27, 1984, in the County aforesaid, did steal fifty-four thousand dollars ($54,000.00), property of George Gick), having a value in excess of three hundred dollars ($300.00), in violation of Article 27, Section 342, of the Annotated Code of Maryland; contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State.

(Article 27, Section 342—Theft Over Three Hundred Dollars)

/s/ William R. Hymes
The State's Attorney
for Howard County

APPENDIX G

IN THE CIRCUIT COURT
FOR HOWARD COUNTY

Criminal No. 14048

STATE OF MARYLAND

v.

BERNARD F. GOLDBERG

AGREED STATEMENT OF FACTS

[Filed Feb. 24, 1986]

Now comes the State of Maryland, by Bernard A. Penner, and Gerald C. Ruter, Special Assistant State's Attorney for Howard County, and Bernard F. Goldberg, the Defendant, with Lewis S. Nippard, his attorney, and do hereby agree that the following Statement of Facts is true and accurate and that the evidence and testimony described herein would be given and before the Court if the witnesses were called.

The Defendant in this case, Bernard F. Goldberg, is a duly licensed attorney and real estate broker in the State of Maryland. As such, the Defendant is fully aware of his responsibilities and duties with regard to money entrusted to him by clients. Since January 1, 1984 through and including the present, Mr. Goldberg has known that monies entrusted to him by clients for the purposes of real estate deposits, and settlement costs, and estate funds, are to be maintained and used only for the purposes for which those monies were intended. Mr. Goldberg knew during the entire period from March 27, 1989 through and including July 18, 1985 that he could

not make personal use of his clients' money or allow one client's funds to be used for the purposes of any other person.

Mr. Goldberg, who resides and has his office in Howard County, Maryland, is and was the President of Title Company of Howard County, Inc. and Area Realty, Inc., whose offices are located in Howard County, Maryland. He was the principal agent of both of those entities and had signature authority over the checking accounts maintained by both entities.

Dr. Marshall Belaga's testimony is that on March 27, 1984, he entered into a contract to purchase the property known as 3691 Park Avenue, in Howard County, belonging to Bernard F. Goldberg. Dr. Belaga can identify Mr. Goldberg as the Defendant. Mr. Goldberg advised Dr. Belaga that the building was about to be sold at foreclosure auction and therefore the Defendant wanted to sell it. The real estate agent with whom Dr. Belaga dealt was Clayton Hemp. Belaga gave Hemp a $10,000 check payable to the Title Company of Howard County. The contract specified that the deposit was to be held by the Title Company of Howard County. (See attached Exhibits 1 & 2.)

Dr. Belaga was never advised by either Mr. Goldberg or Mr. Hemp that the Title Company of Howard County was Mr. Goldberg's company. Had he been aware of this fact, Dr. Belaga would not have allowed his deposit money to be held by the Title Company of Howard County. Dr. Belaga never authorized any other use for his $10,000 deposit. He wrote a check for $10,000 payable to the Title Company of Howard County which he gave to Clayton Hemp.

Clayton Hemp's testimony is that he gave Dr. Belaga's check to Bernard F. Goldberg, whom Hemp can identify as the Defendant.

The Defendant then deposited this check to the Suburban Bank account of the Title Company of Howard County. (See attached Exhibit 3.)

Several days later, Dr. Belaga informed Clayton Hemp that he did not elect to complete the contract and wanted his deposit money back. Hemp acknowledged written notification of this fact. Hemp informed the Defendant that Belaga wanted his money back. (See Exhibit 4.)

An analysis by Marcelino Ferrer, Investigative Accountant, of Suburban Bank account number 52-0985, in the name of the Title Company of Howard County, into which the $10,000 check was deposited reveals that the $10,000 was spent. None of it went to Dr. Belaga. The balance of the account fell below $10,000, almost immediately upon deposit of the money. Mr. Ferrer's testimony is that Dr. Belaga's $10,000 was used to cover miscellaneous personal expenses of the Defendant including several outstanding overdrawn checks.

Distressed at not getting his money back, Dr. Belaga repeatedly demanded return of his deposit from Hemp. Hemp in turn continued to request the money from the Defendant.

On April 12, 1984, the Defendant wrote a $10,000 check payable to Dr. Belaga, drawn on the Area Realty account at First National Bank. (See attached Exhibit 5.)

The analysis by Marcelino Ferrer of the First National Bank account number 152-9958-6, in the name of Area Realty, Inc. from which the $10,000 Area Realty check was drawn reveals no transfers from Suburban Bank. The analysis further reveals that the source of the $10,000 is not Dr. Marshall Belaga's money. The Defendant willfully failed to hold Dr. Belaga's deposit money and instead, appropriated it to his own use and discretion.

Mr. Ferrer's testimony is that there were only three real deposits into the Area Realty account, none from the Title Company of Howard County. Instead, the largest deposit came from an Annapolis Federal cashier's check made payable to Ming K. and Jan F. Liu for $71,762.28, endorsed over to Bernard F. Goldberg.

Jeffrey Neuman, a real estate agent, testifies that on April 23, 1984, settlement of the sale of a piece of property known as 3602 B Joycin Court in Howard County was held. Ming K. Liu and his wife were the buyers and Glenwood Realty, represented by Jeffrey Neuman, was the seller. The settlement agent was the Title Company of Howard County. (See attached Exhibit 6.)

Bernard F. Goldberg, whom Jeffrey Neuman can identify as the Defendant, handled the settlement at his office. At settlement, the buyer tendered two checks for the entire purchase price of the property. One check, drawn on Annapolis Federal for the amount of $71,762.28, and the other check drawn on the Liu's personal bank account for $3,199.87, made payable to Bernard Goldberg. Both of these checks were deposited into the Area Realty account at First National Bank. Jeffrey Neuman relied that the settlement money would go to pay off the outstanding mortgage on the property held by Old Court Savings and Loan. This was not done. Instead, Marcelino Ferrer's analysis of the bank account revealed that the money was spent on other things including covering checks already drawn on the Area Realty account. (See attached Exhibits 7, 8 & 9.)

In May of 1984, Neuman was notified by Old Court Savings and Loan that the mortgage on 3602 B Joycin Court was in default. Neuman contacted the Defendant who advised him that the matter would be taken care of.

In June of 1984, Neuman was again notified by Old Court Savings and Loan that the mortgage was in default. Neuman again demanded payment by the Defendant.

Subsequently, a check dated June 14, 1984, was drawn on First American Bank, payable to Old Court Savings and Loan, in the amount of $57,507. This check paid off the mortgage which Old Court held on 3602 B Joycin Court. (See attached Exhibit 10.)

An additional $959.38 check was drawn on the First American account to cover the mortgage payment made by Neuman to prevent foreclosure on the property by Old Court. (See attached Exhibits 11 & 12.)

The deed for 3602 B Joycin Court was not recorded until June of 1984, even though settlement occurred in April. (See attached Exhibit 13.)

An analysis of the First American account number 00442-28-3, in the name of Bernard F. Goldberg—Attorney at Law (over which the Defendant had signature authority) revealed that there were no funds transferred from the First National Bank Area Realty account to First American Bank. The source of the $57,507, which paid the Old Court mortgage was not the Liu's purchase money. The analysis of Marcelino Ferrer revealed that Bernard F. Goldberg willfully appropriated the Liu's money to some other purpose than that which it was entrusted to him.

Glen Nikirk, Frederick City Administrator, and Thomas Summers, City Alderman, testified that on June 13, 1984, Bernard F. Goldberg, acting as attorney for Sol Shiental, seller of approximately 75.5 acres in Frederick County, Maryland, accepted a $50,000 check, payable to the Defendant, from the purchaser, the City of Frederick.

Bernard F. Goldberg deposited this $50,000 into his Attorney at Law account in Howard County, at First American Bank on June 13, 1984. (See attached Exhibit 14.) The check to Old Court Savings and Loan to pay off the Liu mortgage is dated June 14. The source of the money paying off Old Court is the Frederick deposit.

On June 19, 1984, a contract for the sale of the land was to be used for an extension of the Frederick City Airport, was entered into between Sol Shiental (seller) and the City of Frederick (purchaser) listing a full purchase price of $1,888,825.00. The purchase price was to be paid with a $300,000.00 deposit. The deposit money was to be held in escrow by the seller's attorney, Bernard F. Goldberg, until settlement on December 13, 1984. (See attached Exhibit 15.)

On July 10, 1984 and July 23, 1984, Bernard F. Goldberg, whom Glen Nikirk and Thomas Summers can identify as the Defendant, received two more checks, each for $125,000, from the City of Frederick. Summers and Nikirk handled the transaction on behalf of the purchasers, the City of Frederick. Goldberg deposited both of these checks into his account at First American Bank.

Toward the end of 1984, Thomas Summers, Alderman for the City of Frederick, approached the Defendant about getting an extension on the settlement date. Goldberg agreed on behalf of Sol Shiental and drafted an addendum to the original contract of sale which called for an additional $100,000 deposit to be held by Bernard F. Goldberg. (See attached Exhibit 16.)

Sol Shiental's testimony is that he was never told about the $100,000 additional deposit. Instead, prior to granting any extension, Shiental insisted that he get ten percent interest on the entire purchase price from the date of the original settlement through the extension. This condition was never made clear to the representatives of the City of Frederick. The addendum did not have any provision for the interest payment.

Mayor Young of Frederick signed the addendum and Bernard F. Goldberg accepted and deposited the additional $100,000 check into his account at Yorkridge Calvert Savings & Loan Association number 01-303044-00 in the name of Bernard F. Goldberg, Attorney (over which

the Defendant had signature authority.) The addendum was never signed by Sol Shiental. (See attached Exhibit 17.)

On January 22, 1985 the City of Frederick issued a check for $1,488,825, to Bernard F. Goldberg, representing the balance of the purchase price. Bernard F. Goldberg also signed a receipt dated January 22, 1985, for the money which he had accepted on deposit. (See attached Exhibits 18 & 19.) Subsequently, Bernard F. Goldberg sent Sol Shiental $1,400,000. Mr. Shiental was living in the State of Florida during the entire course of these transactions.

Shiental did not, and has never, received the remaining $488,825 balance of the purchase price. He and his attorneys wrote to the Defendant on numerous occasions demanding payment. On March 12, 1985, Bernard F. Goldberg issued a check for $388,825 to Sol Shiental. The $100,000 difference was to be Bernard F. Goldberg's fee. The check was returned Not Sufficient Funds. (See attached Exhibit 20.)

The Defendant subsequently had conversations with Shiental's lawyer, Ben Rosenberg, who can identify Bernard F. Goldberg as the Defendant. Rosenberg's testimony is that Goldberg insisted that Rosenberg should not file any complaints against him because then Goldberg could never recoup the money for Shiental.

Marcelino Ferrer conducted an analysis of the accounts into which this money was placed. That analysis revealed that neither the First American, nor Yorkridge Calvert accounts ever carried balances adequate to cover the amounts of deposit money which should have been in them. The deposited amounts were always used to cover overdrafts for checks previously written. Furthermore, personal payments were made both to cash and Goldberg as well as persons other than Shiental from these accounts.

The $125,000 check of July 23, 1984 was co-mingled with Bernard F. Goldberg's personal and other clients' funds in the First American Bank account.

The account at Yorkridge Calvert had significant overdrafts and was carrying a negative balance throughout a significant portion of its existence.

Donald Crist, Jr., a real estate agent, testifies that on April 16, 1985, settlement was held on the sale of a residence known as 3701 Century Avenue at the office of the Title Company of Howard County. Bernard F. Goldberg acted as settlement agent. Crist was at the settlement on behalf of William Lippincott and his wife, the sellers, and can identify Goldberg as the Defendant. (See attached Exhibit 21.)

At settlement, Goldberg received a check from the purchasers, Larry Horsey and his wife, drawn on the account of the Perpetual Mortgage Company in the amount of $58,905.41. At that time, the Defendant disbursed a series of checks drawn on his Yorkridge Calvert account. Among them was a check for $1,472.50, payable to Century 21—Crist Realty, as commission to the seller's agent. Bernard F. Goldberg told the parties at the settlement not to negotiate his Yorkridge Calvert check for several days in order to allow the out of state Perpetual Mortgage check to clear.

The Defendant was supposed to use $48,913.11 to pay off an existing mortgage on the residence held by the Mercantile Mortgage Corporation. He willfully failed to do so. He deposited the entire $58,905.41 check into the same Yorkridge Calvert account which was already showing insufficient funds to cover the $388,825 check to Sol Shiental. The above analysis was conducted by Marcelino Ferrer. The mortgage held by Mercantile Mortgage Corporation was not paid off by the Defendant. Instead, the Defendant appropriated the money by depositing it into an account operating at a deficit.

Lou Crist testifies that on April 19, 1985, the check to Crist Realty was returned uncollected funds. On April 26, 1985, it was returned Not Sufficient Funds. Finally, after a series of complaints by Lou Crist, the $1,472.50 was paid to the Crists in cash by a woman identifying herself as the Defendant's daughter. (See attached Exhibit 22.) The Defendant willfully appropriated this money to a use other than that for which was entrusted to him.

George Gick's testimony is that he hired Bernard F. Goldberg, whom he can identify as the Defendant, for $6,000 to handle the estate of George's father, Edward Gick. Edward Gick died on May 2, 1984. Edward Gick had two sons, George and John. Edward Gick died possessed of a house at 905 Woodsdale Road and more than $75,000 in savings. Edward Gick's Last Will and Testament required that his estate be equally divided between his two sons. On May 31, 1984, the Defendant became the Personal Representative of Edward Gick's estate.

John Gick, who can identify Bernard Goldberg as the Defendant, testifies together with his brother George, that he found a purchaser for the house at 905 Woodsdale Road. The sale price of the house at 905 Woodsdale Road was $60,000. The purchaser, Mae Manger, would pay $6,000 initially, and the balance would be paid by the purchaser to the Gick brothers over a period of time. The first $24,000 was to be paid within 90 days of settlement. The remaining $30,000 would be paid over a ten year period. (See attached Exhibit 23.)

Settlement occurred on July 30, 1984 with Bernard F. Goldberg acting as the Personal Representative for the estate of Edward Gick. The Defendant received $6,000, which was his fee, at settlement. (See attached Exhibit 24.)

On October 26, 1984, the purchaser paid $24,000, which Bernard F. Goldberg deposited into the Yorkridge Cal-

vert account, despite the fact that a separate escrow account number 130-30482, in the name of Estate of Edward Gick (over which the Defendant had signature authority) had been set up. (See attached Exhibit 25.)

Pursuant to the terms of the estate disbursment on the first and final account, each of the Gick brothers were to receive $9,770 from this $24,000. The Defendant wrote them both checks for this amount on April 18, 1985 from the Yorkridge Calvert account. Both checks were returned Not Sufficient Funds in spite of the fact that the original $24,000 check had cleared. (See attached Exhibits 26, 27 & 28.)

The Gick brothers continued to pursue the matter and were ultimately paid their $9,770, each in cash at Goldberg's office in Howard County.

When the Gick estate was being opened in July of 1984, the Defendant advised George Gick that in order to sell his father's house before the estate was closed, an escrow account had to be set up with sufficient funds to cover the purchase price of the house. Thus, George Gick was led to believe that he had to entrust the Defendant with $54,000 of his father's estate money in order to sell the house.

Based on these representations, George Gick took his father's savings in the amount of $78,200.87, and gave them to Bernard F. Goldberg to place into an escrow account. On July 11, 1984, Bernard F. Goldberg signed a document acknowledging receipt of the above-mentioned money from George Gick. (See attached Exhibits 29, 30, 31, 32, 33 & 34.)

The analysis of Marcelino Ferrer revealed that the Defendant never placed this money in an escrow account. Instead, he deposited it into his First American and Yorkridge Calvert Attorney bank accounts where the funds were immediately credited to cover other overdrafts. The analysis of the Estate of Edward Gick es-

crow account reveals that less than $19,000 was deposited to that account.

There is furthermore no evidence that the money handed over by George Gick for the escrow on the sale of the house was ever placed in any escrow account. The Defendant deceived George Gick in asserting that his father's savings were placed in an escrow account to cover and to make it possible for the residence at 905 Woodsdale Road to be sold.

George Gick never received any of this money back from Bernard F. Goldberg after the estate was closed despite repeated efforts to get it. On May 1, 1985, Mr. Gick accepted a check in the amount of $76,499, drawn on the Yorkridge-Calvert Attorney account. The check was returned Not Sufficient Funds. George Gick resubmitted the check at Mr. Goldberg's request with the same result. On June 1, 1985, George Gick accepted a check in the amount of $76,499, drawn on a different account. This second check was also returned Not Sufficient Funds. To date, neither George Gick nor John Gick have received any of the money taken from them by the Defendant. (See attached Exhibit 35.)

Marcelino Ferrer's testimony is that the Suburban Bank account number 52-0985, Title Company of Howard County, was opened on February 29, 1984, and closed by the bank on April 26, 1984. There was no money left in the account and there were numerous overdrafts and service charges which were paid.

The Area Realty account number 152-9958-6 at First National Bank was opened on April 4, 1984 and closed by the bank on June 4, 1984. There was no money left in the account and there were numerous overdrafts and service charges which were paid.

The Bernard F. Goldberg Attorney at Law account number 00442-28-3 at First American Bank was opened on June 8, 1984, and closed by the bank on September 24, 1984. The account had a deficit of more than $6,000

which was repaid to the bank. There were numerous overdrafts and service charges which were paid.

Furthermore, there were a substantial amount of checks written from that account to cash, Bernard Goldberg, and other persons. These checks cleared.

The Bernard F. Goldberg Attorney account number 01-30344-00 at Yorkridge-Calvert Savings and Loan was opened on August 13, 1984, and was closed due to an attachment of the $26,700 remaining in the account on June 19, 1985.

The Estate of Edward Gick account number 130-30482 was opened on February 29, 1984, and was still open on March 13, 1985, carrying a balance of less than $500.00.

Marcelino Ferrer, who has qualified as an expert accounting witness in the past and has been employed as an investigative auditor by the State of Maryland since 1973, testifies that in his expert opinion:

1. Dr. Belaga's $10,000 deposited into the Title Company of Howard County account was misappropriated and used to cover other checks drawn by the Defendant.

2. From the Liu's $71,762 deposited into the Area Realty account $57,507.00 was misappropriated and used to cover other checks drawn by the defendant.

3. The City of Frederick's $400,000 deposit money was misappropriated and used to cover other checks drawn by the Defendant including the $57,507 check to Old Court Savings and Loan to pay off the mortgage on the property purchased by the Liu's. Eighty-eight thousand eight hundred twenty-five dollars ($88,825) of the City of Frederick's purchase money was appropriated and used to cover other checks drawn by the Defendant. The $125,000 City of Frederick deposit money placed in the First

American Bank account entitled Bernard F. Goldberg Attorney at Law was commingled with other people's money and used to make personal payments.

4. The $58,905.41 paid by the Horsey's for the purchase of the Lippincott's home at 3701 Century Avenue and deposited into the Yorkridge-Calvert Bernard F. Goldberg Attorney account was misappropriated and used to cover other checks drawn by the Defendant.

5. The $54,000 entrusted to the Defendant by George Gick from his father's estate was not deposited into the Estate of Edward Gick account, but rather into the Yorkridge-Calvert Goldberg Attorney account where it was used to cover other checks drawn by the Defendant. This money was stolen and has never been returned.

6. The $24,000 paid by Mae Manger for the purchase of Edward Gick's house was deposited into Yorkridge-Calvert Attorney account and was misappropriated to cover other checks drawn by the Defendant.

IT IS SO AGREED.

2/21/86 /s/ Bernard F. Goldberg
Date BERNARD F. GOLDBERG
Defendant

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